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In the Supreme Court of the United States

OCTOBER TERM, 1977

PETER V. PAPPAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Opinions of the Courts Below 2

Jurisdiction 2

Questions Presented for Review 2

Constitutional Provisions Involved 4

Statement of the Case 4

Reasons for Granting the Writ 7

Conclusion 45

Appendix:

G. "Memorandum to Heads of Executive Departments and Agencies", issued by Attorney General of the United States, Oct. 16, 1972 ..... App. 1

H. Order No. 537-73 of the Attorney General, Amending G. ..... App. 4

I. Order of the Seventh Circuit Court of Appeals Denying Request for Hearing Before Lower Court dated March 10, 1978 ..... App. 5

AUTHORITIES CITED

Cases

Angelini v. United States, 565 F. 2d 469 (1977), (7 Cir. Ill.) #77-1152, *cert. pending* #77-938 34

Bruton v. United States, 391 U.S. 123 (1968) 17

Delli Paoli v. United States, 352 U.S. 232 (1957) 42

Goldman v. United States, 316 U.S. 129 (1942) 24, 26

Hoffa v. United States, 385 U.S. 293 (1966) 13, 26, 36, 43, 44

PAGE

In Re John M. Daley, #76-1657, 7th Cir., 1976 33

Katz v. United States, 389 U.S. 347 (1967) 24, 26, 27

Krulewitch v. United States, 336 U.S. 440 (1949) 42

Lopez v. United States, 373 U.S. 427 (1963) 26, 27, 34

McNabb v. United States, 318 U.S. 332 (1943) 34, 39, 41

Monroe v. United States, 98 US App (D C), 234 F. 2d 49 34

Nash v. United States, 54 F.2d 1006, 352 U.S. 247 42

Olmstead v. United States, 277 U.S. 438 (1927) 24, 26

On Lee v. United States, 343 U.S. 747 (1952) 13, 26, 27

Osborn v. United States, 385 U.S. 323 (1966) 13, 16, 34

Rewis v. United States, 401 U.S. 808 (1971) 12

Silverman v. United States, 365 U.S. 505 (1961) 24

Smith v. Wunker, (1972, DC Ohio) 356 F. Supp. 44 29

United States v. Bynum, (1973, DC NY) 360 F. Supp. 400, affd. (CA NY) 485 F. 2d 490 29

United States v. Caceres, 545 F. 2d 1182 (9th Cir. Cal. 1977), *cert. pending*, #76-1309 .....34, 36, 39

United States v. Falcone, 505 F. 2d 478 (1974) (3rd Cir. CA) 34

United States v. Gigante, 538 F. 2d 202 (1976) (2d Cir. NY CA) 34

United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) 12

PAGE

United States v. Jacobs, 531 F. 2d 87 (2d Cir. NY 1977), *cert. granted*, #76-1193; re-argued Mar. 20, 1978) 34, 39, 42

United States v. Keen, (1974 CA 9 Wash.), 508 F.2d 986 13

United States v. Osser, 483 F.2d 727 (3rd Cir. 1973) 29

United States v. Rich, 518 F.2d 980 (8th Cir. 1975) 30

United States v. Screws, 325 U.S. 91 (1944) 32

United States v. Sourapas, 515 F.2d 259 (9th Cir. 1975) 39

United States v. Starks, 515 F. 2d 112 (1975) 35

United States v. White, 401 U.S. 745 (1971) 14, 26

Weiss v. United States, 308 U.S. 321 (1939) 29

Zwiebon v. Mitchell, (CA DC 1975) 516 F.2d 594 13

CONSTITUTIONAL AND STATUTORY AUTHORITIES CITED

United States Code

5 U.S.C. 552 39

18 U.S.C. 371 4

18 U.S.C. 1341 ..... 4, 9

18 U.S.C. 1952 10

18 U.S.C. 2510 (4) 28

18 U.S.C. 2511 (1) 12

18 U.S.C. 2511 (2) (c) 21, 28, 30

18 U.S.C. 2512 (2) (c) 13, 30

18 U.S.C. 2518 (8) (a) 22

18 U.S.C. 2518 (10) (a) 18

47 U.S.C. 301 31

47 U.S.C. 303 (r) 31

United States Constitution

PAGE

4th Amendment 13, 23, 24, 26, 27

5th Amendment 5, 40

6th Amendment 4, 42

Miscellaneous

31 Fed. Reg. 3397, 3398 31

F.C.C. Report: In Re Use of Recording Devices in Connection with Telephone Service, 11 F.C.C. 1033 (1947) 31

"The Consent Problem in Wire-Tapping", Columbia Law Review, Volume 68 L: 189 32

"The Eavesdroppers" (1959), by Samuel Dash 15

The N.W.C. Report, 1976: "Electronic Surveillance" 27

Ill. Rev. Stat., Chapter 38, Para. 14-2 30

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To: *The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.*

Petitioner Peter V. Pappas, appearing Pro Se, Defendant-Appellant in the Court below, prays that a Writ of Certiorari issue, to review the judgment and Orders of the United States Court of Appeals for the Seventh Circuit entered in this case, and in the companion cases filed by Petitioners Craig, Walker and North.

OPINION BELOW

The Opinion of the three judge *en banc* panel of the Seventh Circuit including the lengthy dissent, has not yet been officially reported. It is printed in a Joint Appendix. (App. D, pp. 59-151).

Also included in that Joint Appendix are other Opinions and Orders of the Seventh Circuit involving the Petitioners here, which includes issues presented to this Court now.

For purposes of this Petition, leave is requested to file and use that Joint Appendix together with the other petitioners, Messrs. Robert Craig, Frank P. North and Jack E. Walker. This Petitioner will also adopt some of the questions and the reasons for granting the Petitions of Petitioners Craig, North and Walker.

JURISDICTION

The decision of the Court of Appeals for the Seventh Circuit was filed December 12th, 1977, and is set forth in the Joint Appendix. (App. D, pp. 59-151) The Motion for Re-Hearing En Banc was filed December 27th, 1977. and ultimately denied on March 21st, 1977. (App. E, p. 152) This Petition is filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1524 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Were the "Legislative" documents and evidence admissible in this case, or, were they inadmissible, either under federal common law principles extending "legislative" Privileges and Immunities to Federal Criminal Prosecutions, or, inadmissible under Federal Rules of Evidence, and was such Admission sanctioned by the Seventh Circuit in conflict with decisions in other Circuits?

2. Whether the lower Court over-extended Federal Jurisdiction for prosecution under the Mail Fraud and Travel Acts, for Acts that should have been prosecuted,

if at all, under State Law, such over-extension being in conflict with Congressional Intent and in Conflict with applicable decisions of this Court?

3. Whether Tapes of "consensual" conversations were inadmissible, and their Admission in conflict with federal law and the Constitution, and in conflict with applicable decisions of this Court?

Were the tapes not admissible because, contrary to law:

—The Tapes were not "marked" nor readily identifiable.

—The Tapes were not under "Seal" and thus not Preserved.

—A Chain of Custody of the Original Tapes, from the time they were made, until the trial, was not established.

—The Original Tapes were never produced in Court.

—There was an abuse of and a violation of the Fourth Amendment.

—The Tapes were not made with anyone's *"prior consent"*.

—The Tapes were not made under *"color of law"*.

—The Tapes were not played to *"corroborate"* testimony.

4. Whether this Court should now Exercise its powers to order suppression of the tapes of "consensual" conversations where the Government did not prove compliance with Attorney General Guidelines? (This Question is now before this Court. *United States* v. *Caceres*, #76-1309.)

5. Whether the consolidation of two separate indictments, one for Mail Fraud and Interstate Travel charging Eight Defendants, with another charging only one of said Defendants for Perjury, was prejudicial to the remaining Seven Defendants; and was that consolidation in conflict with applicable Court Decisions and Due Process? (This

Question is now before this Court. *United States* v. *Jacobs*, #77-1913.)

6. Whether the Government's actions in this case, including the taping of "consensual" conversations of this Petitioner, was within such a "critical" stage as to be an abuse and a violation of this Petitioner's Right to Counsel under the Sixth Amendment?

7. All other Questions raised in the Petitions of Messrs. Craig, Walker and North, filed in this matter.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

> The right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

Constitution of the United States, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This Petitioner, with the other three co-Petitioners filing their individual Petitions herein, were charged in a multiple-count indictment. (R. 1, the Indictment, 74 CR 879). Also named in the indictment were a number of unindicted co-conspirators or co-schemers.

Count 1 charged 22 persons, including this Petitioner, with a Conspiracy to commit Mail Fraud in violation of 18 U. S. C. 371.

Count 2 charged 21 persons, but not this Petitioner, with Mail Fraud and violations of State Laws, in violation of 18 U. S. C. 1341. Counts 3-12 are companion counts for Mail Fraud, involving separate mailings. The Record reflects that the Government Exhibit Numbers tallied directly with the Count Number.

Another case only against Kenneth W. Course charged him with perjury before the Grand Jury, 75 CR 202. Still another case charged Robert Craig and Louis Markert, 74 CR 877, and in that case the issue of legislative immunity was raised before this case came to trial. Those lower court opinions are also set forth in the Joint Appendix. Those issues are raised in this matter as well, particularly by Petitioners Craig, North and Walker.

During the investigatory phase of this matter, the Government caused two of its immunized witnesses to secretly tape "consensual" conversations with others. Though eleven tapes of conversations with this Petitioner were known to be made, only two of them were introduced as evidence. Two other tapes of similar conversations and other tapes intercepting telephone conversations were also introduced as evidence.

In addition, during that investigatory period, the Government granted immunity to two corporations so as to secure the testimony of certain corporate executives whom they then immunized.[1] Two Illinois legislators were also effectively immunized.

Pre-Trial Motions to Suppress the "Consensual" Tapes were argued and denied, renewed during the trial and again denied. The tapes were then admitted, but *not* as "corroborating" evidence.

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[1] This grant is extraordinary because corporations, not enjoying Fifth Amendment privileges, have never been so immunized.

After a 9-week trial, the Jury found one legislator-defendant and another redi-mix operator defendant innocent, but convicted the six remaining defendants, including this Petitioner. (R. 237) The Trial Judge then granted a Motion for Acquittal Notwithstanding the Verdict as to another legislator-defendant.

Sentence was entered on October 29th, 1976 (R. 289-292), and a timely Notice of Appeal was filed on November 5th, 1976. (R. 300) Then one legislator-defendant, Kenneth W. Course, withdrew his appeal, and passed away.[2]

Briefs were filed on June 13th, 1977 and Arguments heard on June 16th, 1977 before a three-judge panel of the Seventh Circuit.

On December 12th, 1977, the Opinion of the two-judge majority, plus a lengthy dissent by Judge Luther M. Swygert (formerly Chief Judge of the Circuit) was issued. A timely Motion for Re-Hearing was filed on December 27th, 1977.

While the Petition for Re-Hearing was pending, the Appellants filed Motions in February, 1978, seeking leave for a hearing before the District Court to determine if the Government Attorneys had complied with Guidelines of the Attorney General in causing the "consensual" tapes to be made. Those Motions were denied.

On March 21st, 1978, the Seventh Circuit denied the Motions for Re-Hearing En Banc. On March 27th, 1978, a Motion to Stay the Mandate was filed, and was granted on April 6th, 1978.

This Petition is now filed on the date due.

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[2]76-2091 in the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review its Judgment herein and in the companion cases, and the Orders issued by that Court.

In this Case, the Seventh Circuit has decided various issues and its decision is in conflict with the decisions in other Circuits.

It has also decided various important questions of Federal and Constitutional Law, which are in direct conflict with decisions of this Court and with decisions in other lower courts.

Moreover, the Seventh Circuit departed from the accepted and usual course of judicial proceedings, thereby sanctioning such departures by the Trial Court, such departure now calling upon this Court's exercise of its supervisory powers. The strong dissent in the Seventh Circuit en banc panel decision supports this observation as well as the foregoing comments. Noted are departures by the Government, from Constitutional, Legislative and Administrative standards, from appropriate prosecutorial standards, to unduly extend Federal jurisdiction to this case. The Government's actions did not meet those high standards, approved by the Judiciary, thus not assuring either due process, nor a fair trial; and in fact resulting in an abuse of due process and violations of various privileges under the Bill of Rights.

To be more specific, we submit the following Reasons, identifying each by the same Number as the "Question" presented.

1. The "Legislative" Documents and "Legislative" Evidence Were Not Admissible.

Petitioner Craig has raised this issue in his petition, and set forth the Reasons for granting this Petition.

This Petitioner adopts the Craig Questions and the Craig Reasons.

At first blush, because this Petitioner is not an Illinois legislator, it may be assumed that he has no "interest" in that question, that he is not thereby affected.

However, the record clearly indicates otherwise. This Petitioner, as legislative aide to Illinois' Secretary of State, and as his liaison to the Illinois General Assembly, supplied legislative services to various Illinois legislators. He acted as *their* "aide"—drafting *their* legislation—legislation not affecting the Office of the Secretary of State,[3] as a service to them.

Moreover, various "legislative" documents, presented by the Government, and whose admission is now questioned, were prepared by this Petitioner, and that fact was made known to the petit jury.[4] Thus, their admission was prejudicial to this Petitioner, and if they are now quashed, their inadmissibility would erase that prejudicial effect in any subsequent trial.

2. There was an over-extension of Federal Jurisdiction in this case.

Judge Swygert in dissenting, succinctly stated the Reasons to grant this Petition.

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[3] Legislator Pete Pappas so attested during the trial. Pete Pappas and Petitioner Peter V. Pappas are not related.

[4] Gov. X 26, 27, 38, 38a, 39, 42a, 48, 61 and 62.

> "This case follows a pernicious trend that has been developing in our federal criminal jurisprudence over a long period of time: the extension of federal jurisdiction beyond anything intended by Congress when it enacted the various provisions of the Criminal Code. (Only the Supreme Court seems to have recently called a halt, e.g., *United States* v. *Maze*, 414 U.S. 395 (1974); *Rewis* v. *United States*, 401 U.S. 808 (1971).)" Joint App. p. 127.

The "scenario" he sets forth at the conclusion of his lengthy dissent[5] is not far fetched. It can be fully substantiated, chapter and verse.

A. The Mail Fraud Count (18 U.S.C. 1341):

Petitioner Walker has in his Petition set forth his reasoning on the over-extension of federal jurisdiction as to this Count, and this Petitioner adopts the Walker Petition.

We submit that the Federal attorneys stretched the mail fraud statute beyond the breaking point, because the mailings here were, at best, only tangentially related to the alleged scheme.

Count 2 of the Indictment (R. 1), names 21 persons as the "co-schemers" who devised the alleged scheme to defraud, but it is significant, that this Petitioner, Peter V. Pappas, is not named as one of those "co-schemers".

Moreover, the government has persisted that *all* of the mailings here ". . . were either placed in the mail by a co-schemer, or mailed to a co-schemer, or both."[6] Thus,

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[5] Joint App. p. 142.

[6] P. App. Br. at 77-8.

Peter V. Pappas is not charged directly with use of the mails. Nor was there any evidence of his "knowledge" that the mails were to be or were used.

Judge Swygert also indicated in his dissent that:

> ". . . the record is completely bare of evidence that any of the defendants or their co-schemers contemplated, agreed or intended to use the mails to further the execution of their scheme to defraud the citizens of Illinois." Joint App. at 141-2.

B. The Travel Count (18 U.S.C. 1952).

All of the activities in this case were local, all within Illinois, and the activity itself was wholly intrastate in nature, with no interstate activity or interest.

Illinoisans sought from the Illinois General Assembly, enactment of legislation to increase weights on Illinois highways, for Illinois trucks delivering redi-mix from Illinois points to Illinois destinations, and *only* on local Illinois highways. Use of the Interstate system would have been prohibited. The $50,000.00 fund was raised for that legislation, all from persons within the Chicago area, based upon the formula of $40.00 per redi-mix truck operated by each of those persons. This was all done on a man-to-man basis, by personal contact.

After the formula was devised, Lauwereins,[7] an unindicted "co-schemer", traveled from Chicago to Indianapolis, to attend the annual meeting of the Illinois Division of the Midwest Ready-Mix Concrete Association.[8] The

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[7] Lauwereins was an executive with Material Service Corporation, immunized in August of 1973. His company had "downstate" interests and were members of that Illinois Division.

[8] The Illinois Division consisted of "down-state" Illinois ready-mix operators.

Indiana Division was the host that year, and the Illinois Division hosted the meeting the prior and following year.

Lauwereins met with the downstate Illinoisans, members of that trade association, and asked them to contribute to the $50,000.00 fund. They refused.

Lauwereins returned to Chicago, back to his job. There was no showing that anyone else, that any other "co-schemer" directed or was consulted about that trip and the attempts to raise funds. Nor was there any showing that anyone else received a report of the failure, or that it affected in any way, the raising of the $50,000.00.

Thus:

A. The fact that the meeting in 1972 was held in Indianapolis was *fortuitous*—having been set as is usually the case, long before the conspiracy began.

B. This trip by Lauwereins was *unforeseen*, and not foreseeable by anyone.

C. Since the $50,000.00 fund was entirely a Chicagoland fund for Illinois purposes, the trip was neither essential nor necessary, and the support of that downstate group was neither necessary, nor used, nor ever contemplated by anyone.

D. Lauwereins was on some secret mission of his own.

Lauwereins himself was not called upon by the Government to testify. The *Brady* material indicated that Lauwereins had consistently failed pre-trial lie detector tests. Thus, the Government declined to use its own witness, relying instead on "hearsay" of what Lauwereins had stated to others.

Judge Swygert's dissent dissected this matter as well with:

> "This one trip cannot suffice to invoke jurisdiction under the travel act. The scheme involved here was outside the ambit of congressional concern—there is nothing about the scheme which suggests any reason why state police powers needed to be supplemented by the federal government. I would therefore hold that the interstate activity was 'so minimal, incidental, and fortuitous, and so peripheral' to the scheme, *Isaacs, supra* at 1146, that it was error to submit these counts to the jury." Joint App. p. 141.[9]

3. The Tapes of the "Consensual" Conversations were Inadmissible.

To properly consider and advance the various reasons to support this broad statement, this Court must be apprised of the Factual Background, and the decisions of this Court which are in conflict with admission of those tapes at the trial.

Federal Law Governing "Consensual" Tapes.

Federal Law prohibits the willful interception of another's words, and it is presumptively unlawful to do so. 18 U. S. C. 2511 (1). Congress, however, added an exemption, to wit:

> "(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is

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[9] Citing *United States* v. *Isaacs*, 493 F.2d 1124, 1148 (7th Cir.), cert. denied, 417 U.S. 976 (1974). See *Rewis* v. *United States*, 401 U.S. 808 (1971).

> a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U. S. C. 2511 (2) (c).

This is the "consensual" exemption converting an otherwise unlawful electronic surveillance to a lawful one, *if* within the strictures of the exemption and thus not a violation of the Fourth Amendment. *Zwiebon* v. *Mitchell,* CA DC 1975, 516 F. 2d 594. But—failing to come within that exemption may then invoke the Fourth Amendment.

In addition, *absent abuse of constitutional privileges,* such "consensual" electronic surveillances or interceptions, are admissible as evidence *only* under *common law* principles, and the Government, as proponent, has the burden of proof. *United States* v. *Keen,* (1974 CA 9 Wash.), 508 F. 2d 986.

It has been judicially noted with wide approval, that "consensual" tapings—electronic surveillances—are a "dirty business".[10] The use by the Government of a paid informer to eavesdrop ". . . is offensive to the fair administration of justice in Federal Courts."[11] These wholly pre-arranged episodes to permit such eavesdropping with electronic devices, do not excuse the lack of a warrant, or an *"Osborn"*[12] Court Order, and the lack thereof may be as much an invasion of privacy and an unreasonable search, as a warrantless search of one's person, or home. "What

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[10] Justice Frankfurter in dissenting, in *On Lee* v. *United States,* 343 U.S. at 761.

[11] Chief Justice Warren, dissenting *Hoffa* v. *United States,* 385 U.S. at p. 315 (1966).

[12] *Osborn* v. *United States,* 385 U.S. 323 (1966).

the ancients knew as 'eavesdropping', we now call 'electronic surveillance'; but to equate the two is to treat man's first gunpowder on the same level as the nuclear bomb. Electronic surveillance is the greatest leveler of human privacy ever known. How forms of it can be held 'reasonable' within the meaning of the Fourth Amendment is a mystery.''[13]

It is common knowledge that modern-day tapes come in unmarked reels or cassettes—that these containers are not readily distinguishable from others unless *marked*, either with paint, or inked labels or scratches on the surface. It is also known that the reels of tapes themselves are even more indistinguishable from each other and marking them is difficult, if not impossible. Tapes can be copies, and the original cannot be distinguished from the copy. Tapes can be readily copied, rigged—tampered with—without detection. We need only note the words of Samuel Dash, the legal expert in this field, who counseled the House Judiciary Committee involved with the Nixon tapes. Dash writes:

> ". . . the tape to be edited is played on a machine which can be instantaneously stopped at will. When a word or passage occurs which is to be deleted, the machine is stopped, the piece of tape containing the unwanted section is cut out, and the two loose ends are spliced. The words cut out can be inserted in whole or in part somewhere else. Sentences can be rearranged. New words can be dubbed in by an impersonator or made up of sounds taken from other words." *Id.*, 369.

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[13] Justice Douglas dissenting in *United States* v. *White*, 401 U.S. at 756 (1970).

". . . a skilfully edited tape cannot be detected with equipment readily available." *Id.*, 371.[14]

With this background—the Record in *this* case should be examined to determine whether the *original* tapes were ever produced in court—whether they were sealed and secured—whether the tapes produced in court were authentically the originals, or were they direct, authentic and exact *copies* of the originals—or was there such a gap in the "*chain of custody*" that the tapes produced are under such a cloud as to be *not* admissible?[15]

The Production of the Original Tapes.

In the fall of 1973, at the direction of then AUSA Sam Skinner, who headed the federal investigation into the redi-mix legislative matter leading to this indictment, Federal Postal Inspector D'Hooge, an electronics expert, was ". . . enlisted in our cause." Tr. 453

D'Hooge secured recording devices and reels of recording tapes, and supplied them to Pete Pappas, then an Illinois legislator and subsequently effectively immunized as a government witness. On each taping occasion, always pre-arranged, D'Hooge controlled the device, activating and de-activating it. Pete Pappas ". . . didn't know (how) it worked". Tr. 375

D'Hooge returned after each taping session, turned "off" the recorder and removed the reels.

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[14] "The Eavesdroppers" (1959) by Samuel Dash, pp. 367-71.

[15] References here are primarily to the Transcripts of the hearings on the Motions to Suppress, and other references are identified as "Trial Transcripts".

Of the numerous tapes so made, only four were used at the trial, all taped in the Fall of 1973:

DATE TAPED IN 1973	PERSONS TAPED	PLACE	GOV'T TAPE NO.
Sept. 27, 1973	Peter V. Pappas Robert Craig	Dining Room, Conrad Hilton, Chicago	101
Oct. 15, 1973	Peter V. Pappas Kenneth Course	Mansion View Motel, Springfield	102
Oct. 23, 1973	Robert Craig	Mansion View Motel, Springfield	103
Nov. 14, 1973	Kenneth Course	Illinois State Senate Chamber	104 [16]

The Copies of Those Tapes

At Pre-trial hearings, the Government presented and identified their "O" Series of tapes, allegedly "raw", unedited tapes of the alleged conversations. Numerous *copies* of this series were also made, and distributed.[17] No evidence was presented to show how these *copies* were produced, and under what conditions they were produced, nor, when in fact they were made.

A Government expert, Weiss, then made a "1" series from an "O" set, prepared to enhance the audibility of the "O" series—a cleansed version.

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[16] Tape 104 was made only after a Court Order entered by Judge Harlington Wood, on November 5th, 1976 at Springfield, Illinois. TR 451-2. The Petition therefor asserted that it was presented ". . . in conformity with the guidelines enunciated in *Osborn* v. *United States,* 385 U.S. 323 (1966)."

[17] The Defendants were given copies of this "O" series.

Weiss also then made, from the "1" series, the "3" series, excised pursuant to *Bruton* v. *United States*, 391 U.S. 123 (1968). The "3" series was played to the trial court and jury.

A. The Original Tapes and Reels Were Not Marked.

Pete Pappas did not recall if he marked or initialed the *first* tape he made on September 27th, 1973, as a prelude to Tape 101, and he did not recall whether or not he initialed Tape 101 either. Tr. 390. Finally, upon being pressed further, Pete Pappas could not state whether he had *ever* initialed any of the "overlay of tape". Tr. 391. The "overlay" referred to a piece of "tape" D'Hooge placed upon some of the *exposed tapes*. Tr. 389.

Moreover, the *lack* of testimony is even more suggestive as to the *lack* of any markings. Pete Pappas did not testify as to whether D'Hooge marked the tapes or reels when he brought them in or when he took them away.

D'Hooge activated the recorder—so that from that point forward, the tape had "ears" until D'Hooge himself later de-activated the recorder. We note the *absence* of D'Hooge's voice on "0" series of tapes produced—and the lack of any sound indicating D'Hooge's departure from or re-entry to the presence of Pete Pappas.

B. The Original Tapes Were Never Under "Seal" and Secured.

Pete Pappas testified as to the handling of the tapes by D'Hooge. As to *some* of the four tapes, D'Hooge ". . . put a tape on them.", Tr. 389; and D'Hooge, as to Tape 101, ". . . taped the tape and placed it into a box and

taped that." Tr. 390. As to Tape 102, Pete Pappas did not ". . . know whether that was sealed or not." Tr. 391

As to Tape 104, the judicially ordered tape, no testimony was given as to whether it had been immediately delivered to the Federal Judge entering the order.[18]

USA Skinner shed little light. Under cross examination by Defense Attorney Lavin, Skinner was asked if the tapes made by Pete Pappas were "under seal." The Trial Judge sustained the Government's objections, foreclosing any further inquiry. Tr. 453.

D'Hooge shed no light—since though he was there in Court in everyone's view, the Government did not see fit to call him, *or,* we submit, was not prepared to risk what D'Hooge would have to say.

Winstein shed no light either. Since his testimony did not suggest any "seal" on the tapes delivered to him—they apparently were not under seal.

The most that can be said is conjecture—that D'Hooge applied an "overlay", over the exposed tape, perhaps to prevent unreeling—a common mishap. That "overlay" did not seem to serve any other purpose.

From that time in 1973 and forward into 1976—the record is a blank. Neither the "overlay" on the exposed tape, nor the "tape" on the box, nor the box itself, were ever seen again by anyone, anywhere, anyplace, and thus the exposed tapes were never "sealed".

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[18] U.S.C. 2518 (8) (a) requires this of such tapes—so that the tapes can be "sealed" and their integrity preserved, by the Court.

C. The "Chain of Custody" of the Original Tapes Was Never Established, and There Was No Direct or Even Indirect Link Between the Original Tapes Released by Pete Pappas to D'Hooge and Those "O" Tapes Presented in Court.

The "chain of custody" started in 1973, with D'Hooge, who supplied the recorders and tapes. Then Pete Pappas had custody for a brief period during the surreptitious taping sessions. Pete Pappas then relinquished them to D'Hooge, and he never saw those original tapes again.

The Record discloses two trails—both leading to dead ends.

Trail No. 1: The D'Hooge Trail.

Pete Pappas relinquished the tapes to D'Hooge in 1973. USA Skinner testified in 1976 that *those* original tapes ". . . were kept by Marcel D'Hooge and agents of the Postal Service, and to this day, Miss Lavin, I don't know exactly where they kept them, but Mr. D'Hooge and the inspectors maintained them". Tr. 452.

D'Hooge, though always present in Court in 1976, was not called upon by the Government to testify as to his custody, nor did the Government call the other "agents" or "inspectors".

This trail ends with D'Hooge, in 1973, never to surface again. No other witness testified that D'Hooge delivered *those original tapes to anyone.*

Trail No. 2: The Winstein Trail.

Winstein, attorney for Pete Pappas, testified that he had agreed to the tapings by his client in 1973, and that it was also agreed *in advance* that the tapes ". . . would

be put in the evidence room, not disclosed to anyone . . .", not even to himself nor to his client. Tr. 101. Pete Pappas, Tr. 375 and 391, and Skinner, Tr. 468-9 and 479, confirmed this advance arrangement, and in particular that the tapes would be kept intact, unused by anyone until later, until after Pete Pappas had agreed upon and made his plea agreement.

Winstein testified that within a few days after Pete Pappas made some tapes in 1973, that federal attorneys (not D'Hooge) delivered tapes to Winstein, at his office in Rock Island, Illinois. Tr. 124-5. Winstein was not to listen to them, as he had agreed. Tr. 125. Winstein thought that the original tapes had been delivered to him. Tr. 183.

Pete Pappas confirmed that it was his impression that the ". . . sealed original tapes . . ." were with Winstein, intact. Tr. 375. Thus, Pete Pappas thought that Winstein had the tapes released by him (Pappas) to D'Hooge, the same tapes upon which D'Hooge had placed "tape" and then placed within a box itself "taped". But, Winstein never mentioned any such "tape", nor any box with "tape".

Winstein testified in 1976, in the court room in Chicago, that as to the *copies* of tapes then in the court room:

> "The tapes that were given to you people today, I don't know what tapes they were and never heard them." Tr. 125.

Thus—this trail ends with Winstein, in 1973, also never to surface again. No other witness testified that Winstein delivered *this set of tapes to anyone.*

Now—noting those two 1973 dead-end trails, we note the subsequent production of sets of the "O" tapes, unconnected to either the D'Hooge set or to the Winstein set.

First, the defense is supplied with a set of tapes, and the government identifies them as *copies* of the "O" series.

Secondly, Pete Pappas is permitted to listen to another set of tapes, again identified by the Government as *copies* of the "O" series. Pete Pappas himself testified that they were but "*copies*", and that they were delivered to him not by Winstein nor by D'Hooge—but rather by ". . . government people . . .", otherwise not identified. Tr. 387. Pete Pappas had never heard the Winstein tapes, and he thought then, that Winstein still had the *original* tapes, back in his law offices in Rock Island. Tr. 387. He did *not* testify that these tapes had any "tape" on them, or that they came out of "taped" boxes. He first heard the *copies* on February 7th, 1976, then carefully initialed and sealed these *copies;* and then re-heard that same set of *copies* on April 23rd, 1976, again carefully initialing and sealing this set of *copies*. Trial Trans. 1198-1252.

Thirdly, still another set of tapes, again identified by the Government as the "O" series, is supplied by the Government, in early 1976, to Weiss, their electronic expert. Weiss, in his testimony, did not detect nor testify about the presence of any "overlay" or "tape" on the exposed tapes, nor that they came out of a "taped" box. Neither D'Hooge nor Winstein delivered *any* tapes to Weiss.

Thus—no evidence was produced that any of these foregoing sets of "O" tapes were linked in any way, to either the D'Hooge set or to the Winstein set, nor were the D'Hooge or Winstein sets produced either.

D. The Government's Position, and its Fallacies.

The Government, faced with defense objections, took the position that since the "tapes" presented in Court, were "consensual" under 18 U. S. C. 2511 (2) (c), that:

1. The original tapes need not have been impounded and "*sealed*", as in the case of Court-ordered tapes of wire taps under 18 U.S.C. 2518 (8) (a).

2. That the strictures applicable to Court-ordered tapes are not required of consensual tapes.

3. No "chain of custody" need be proven if the ". . . item offered in evidence is identified by a witness as being what it purports to be and is shown to be in substantially the same condition . . .". (P. App. Br. at 119 and fn 156.)

In support of their position, they relied upon the testimony of two witnesses.

Pete Pappas testified in court, that earlier in 1976, he had heard "*copies*" of tapes, listening for the first time since he made the "original" tapes in 1973. Thus, he testified in 1976 that the "O" "*copies*" ". . . truly and accurately portrayed the conversations in which he had participated" in 1973. Trial Tr. 1225-1253 (P. App. Br. at 119). But—Pete Pappas did not *himself* relate in court the actual 1973 conversations—rather *copies* of tapes, the "3" series, were played—as *evidence* of the alleged and uncorroborated conversations.

Weiss, the Government's electronic expert, testified that he had not detected any tampering of the "O" series brought to him in 1976. Trial Tr. 1998. But we have already noted that Weiss did not himself know whether the tapes delivered to Weiss, were the originals, or were copies. Weiss then testified that *if* he had, in fact, examined only a *copy* of a tape, that he could not positively state whether the *original* had, or had not, been tampered with. Trial Tr. 2020. We have already noted Samuel Dash's analysis—

the ease with which tapes can be copied, rigged, tampered with, and remain undetected even by experts.

The Government's position is not only fallacious, but it begs the question; and the Government asserts that it has a lesser burden of protecting the integrity of consensual tapes than the Courts have, as to tapes made under court order![19]

The Government failed to meet its burden—it did not, in fact, present the "original" tapes in Court—and none of *its* witnesses ever identified any set of "O" tapes as the "original" tapes. Neither Weiss nor Pete Pappas identified or linked the "O" series with the original tapes taken away by D'Hooge in 1973, nor with the Winstein set in Rock Island. No testimony was given, to prove the authenticity, the accuracy of the "O" series tapes, who made the *copies* and under what conditions and under whose untrammeled supervision. The chain of custody from D'Hooge, or from Winstein, ended back in 1973; and no chain was established linking them to the tapes produced in Court in 1976.

E. The Electronic Surveillances in This Case Were an Abuse of or Were an Unreasonable Search or Seizure, and a Violation of the Fourth Amendment.

1. "The right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . ."[20]

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[19] If the Government's position is carried to its logical conclusion, then Congress gave unbridled discretion to the Government as to consensual tapes, and this could well be deemed an unlawful delegation of raw legislative power.

[20] Fourth Amendment, U. S. Constitution.

Traditionally, a Fourth Amendment search is one that intrudes upon "security" in relation to the phrase: ". . . in their persons, houses, papers, and effects, . . .".

To determine whether the use of electronic surveillances in this case was an abuse of the Fourth Amendment and an "unreasonable search and seizure", we must examine the record here as well as the applicable case law.

That *Katz*[21] discarded the former "*trespass*" doctrine goes without saying. Thus, *Olmstead, Goldman* and *Silverman*[22] are all superseded by the *Katz* doctrine that:

> "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.", at p. 359.
>
> "For the Fourth Amendment protects people, not places . . . what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.", at pp. 351-2.
>
> "We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.", at p. 353.

2. This case is a post-*Katz* case, and thus the principles of *all* the pre-*Katz* cases are not applicable here.

We note, too, the application by the Seventh Circuit in their decision, of those pre-*Katz* cases to this case. Their

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[21] *Katz* v. *United States,* 389 U.S. 347 (1967).

[22] *Olmstead* v. *United States,* 277 U.S. 438 (1927). *Goldman* v. *United States,* 316 U.S. 129 (1942). *Silverman* v. *United States,* 365 U.S. 505 (1961).

opinion sets forth broad principles, none of which fit this case. The portion of their opinion we take issue with follows:

> We note at the outset the well-settled principle that there is no interest protectible by the Fourth Amendment in those situations in which one party to a conversation reposes a trust or confidence in the other party who is actually an undisclosed government agent or informant. *E.g., Hoffa* v. *United States,* 385 U.S. 293 (1966). Simply put, no legitimate Fourth Amendment interest is involved in such situations, for that Amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* at 302. Nor is the Fourth Amendment violated because the undisclosed agent simultaneously records the conversation with an electronic recording device on his person, *Lopez* v. *United States,* 373 U.S. 427 (1963), or because the conversation is electronically transmitted by the undisclosed agent to a remote place where it is overheard by other agents and/or recorded. *United States* v. *White,* 401 U.S. 745 (1971); *On Lee* v. *United States,* 343 U.S. 747 (1952). Evidence in the form of tape recordings of such conversations are generally admissible where one party to the conversation consents to the electronic recording. *Rathbun* v. *United States,* 355 U.S. 107 (1957); *United States* v. *Bastone,* 526 F.2d 971 (7th Cir. 1975), *cert. denied,* 425 U.S. 973 (1976); *United States* v. *Martin,* 372 F.2d 63 (7th Cir. 1967); *cert. denied,* 387 U.S. 919 (1967)."[23]

The Seventh Circuit majority, in applying these cases, *presumes* that they are applicable here. We submit that none of the pre-*Katz* cases are applicable here and are distinguishable.

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[23] Joint Appendix at pp. 81-82.

The majority relies upon *Hoffa*,[24] and the principle, that Peter V. Pappas reposed his trust in Pete Pappas and thus took the risk whether Pete Pappas would later reveal what he had been told. Hoffa did repose his trust in Partin, but Partin did reveal what he had overheard, and he testified in Court. Here, Pete Pappas did not reveal anything to the Court and jury because he did not himself testify as to the conversations that he had "intercepted" and taped.

They rely on *Lopez*,[25] that the federal agent's simultaneous recording of his conversation with Lopez and, then, to corroborate his testimony, playing that recording to the jury, does not constitute a violation of the Fourth Amendment. But *Lopez* principles do not apply here, because here, Pete Pappas did not himself testify as to the conversations, and thus, the tapes were played, *not to corroborate* Pete Pappas, but rather as independent third party evidence. This leaves as an open question, whether Pete Pappas was or was not a "federal agent".

The Majority also relies upon *White*[26] in conjunction with *On Lee*,[27] presumably to assert that *White* re-asserted *On Lee*. Factually *On Lee* and *White* are virtually identical. But *On Lee* rested upon *Olmstead* and *Goldman*, now repudiated by *Katz*.[28] It is well known that the *majority* in *White* ruled that *White* was a pre-*Katz* case and *Katz* could

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[24] *Hoffa* v. *United States*, 385 U.S. 293 (1966).

[25] *Lopez* v. *United States*, 373 U.S. 427 (1963).

[26] *United States* v. *White*, 401 U.S. 745 (1971).

[27] *On Lee* v. *United States*, 343 U.S. 747 (1952).

[28] *Olmstead* v. *United States*, 277 U.S. 438 (1927); *Goldman* v. *United States*, 316 U.S. 129 (1942); *Katz* v. *United States*, 389 U.S. 347 (1967).

not be applied retroactively. A plurality of four justices (four of the five justice majority) asserted that *On Lee* was still viable. The dissent joined by Justice Brennan (the fifth vote of the majority) made up another plurality of four justices asserting that *On Lee* was no longer viable.

It would appear now that this Court has the opportunity to resolve this issue—as to whether *On Lee* is or is not viable. We submit that application of *Katz* principles to this case precludes any reliance upon either *On Lee* or *White*.

Since the tapes were not used to "corroborate" any testimony, this would appear to preclude reliance upon *Lopez*, and moreover, be in conflict with Congressional intent. We note that the National Commission delegated by Congress to report on eavesdropping and wire tapping generally, as well as on "consensual" recordings or interceptions, reported to Congress that "consensual tapings" were used ". . . merely to corroborate . . ." the intercepted conversations; that in that light, they did not abuse the Fourth Amendment.[29]

It is respectfully submitted that, here, there was an unreasonable search and seizure, an invasion of privacy, and an abuse and a violation of the Fourth Amendment privileges of this Petitioner.

F. These "Interceptions" Were Not "Consensual" Because Pete Pappas Did Not Give, in Advance, His "Prior Consent".

1. Factual Setting:

Pete Pappas entered into a written plea agreement on October 17th, 1973 (R. 107, P. 6).

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[29] NWC Report, April 30, 1976, at P. xv. reported to Congress per Sec. 804, Public Law No. 351, 90th Congress.

Prior to that date, Pete Pappas made Tapes 101 and 102. They were kept intact, in storage, and were not used until after that subsequent plea agreement. Thus, he did not give his "consent" to those "interceptions" until *after* he had made the tapes.

2. The Statute:

18 U. S. C. 2511 (2) (c) provides that:

> "(c) It shall not be unlawful under this chapter for a person acting under color of law to *intercept* a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given *prior consent* to such interception." (emphasis added)

That term "intercept" is statutorily defined at *18 U. S. C. 2510* (4) as:

> "(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

To "intercept" as used in 18 U. S. C. 2511 (2) (c), means the "aural acquisition" of an "oral communication" —that is to actually hear it, to listen to the "intercepted" "oral communication" with the "prior consent" of one of the parties to that conversation.

3. Federal Courts have held that the *storing* of a recording of a conversation, so that it will *not* be heard until some later date, and, where that conversation while so being recorded was *not* overheard by anyone else (either directly or via a radio transmitter), there is no "interception" and no "aural acquisition" with "prior consent" of that conversation. And where the "interceptor" *subsequently* gave consent for "aural acquisition", it was not

"prior" and thus those tapes were *not* admissible. This is exactly the situation here at least as to Tapes 101 and 102, if not also to 103 and 104. *United States* v. *Bynum*,[30] and *Smith* v. *Wunker*.[31] *The Seventh Circuit made no mention of these two cases.*

In *Weiss* v. *United States*,[32] the "interceptions" were suppressed because they were not authorized under Section 605 of the Communications Act of 1934 (47 U. S. C. 605), that "The participants were ignorant of the interception . . . and did not consent there." at p. 330. There the speakers were *subsequently* confronted with the secret recordings and then one gave his subsequent "consent". There, "subsequent" consent was not "prior" consent and the tapes were suppressed.

The record in this case is clear—Pete Pappas merely agreed to tape the conversations—he did not give his "prior consent" to "intercept" within the meaning of the statute, as construed by the courts. There was no "aural acquisition" by anyone *before* October 17th, 1973.

The Seventh Circuit in finding that there was "color of law",[33] was in error, and disregarded cases cited by this Petitioner hereinafter (*Bynum* and *Smith*, supra).

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[30] (1973, DC NY) 360 F. Supp. 400, affd. (CA NY) 485 F. 2d 490. See *United States* v. *Osser*, 483 F.2d 727 (3rd Cir. 1973).

[31] (1972, DC Ohio) 356 F. Supp. 44.

[32] 308 U.S. 321 (1939).

[33] Joint App. p. 87.

G. These "Interceptions" Were Not Made "Under Color of Law."

1. Factual Setting:

Prior to October 17th, 1973, the date Pete Pappas signed his plea agreement (R. 107, P. 6), he was not yet a government witness, nor an "agent" and obviously not a "federal officer". The Tapes 101 and 102, made by him *prior* to October 17th, 1973, were made by him as a *private* person.

2. This Issue.

This precise *issue* of acting "under color of law", in the factual setting of this case, where the Government placed its equipment and its personnel, at the disposal of a *private* person in order for *him* to tape *his* conversations with others, *before* he has given his "prior consent" and *before* he has agreed to become a government witness, has never been raised *prior to this case.*

An additional factor here, is that Pete Pappas was not acting under Illinois law either,[34] because he did not have the required ". . . request of a State's Attorney . . .". Moreover, neither was there any action by the State's Attorney of either Cook or Sangamon Counties under 18 U. S. C. 2516 (2).[35]

3. The case law under 18 U. S. C. 2511 (2) (c) as to "color of law" is sparse.

The Government, in its brief on appeal, cited no basis to support their position, other than *United States* v. *Rich*,[36] where one "Walsh" was found to have acted "under color

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[34] Chap. 38, Para. 1-42, Ill. Rev. Stat.

[35] A State's Attorney may thereunder seek a court order for the "interception" from the State Courts.

[36] 518 F. 2d 980, 985 (8th Cir. 1975).

of law". But in that case, it was clear that Walsh had agreed in *advance* to permit federal agents, not only to tape his conversations, but to monitor them, to listen to and overhear the telephone conversation. Since he gave "prior consent" to use the tapes immediately and simultaneously, that Court held:

> "Nevertheless, Walsh was acting at the direction of government investigators, and in the *limited circumstances of this case* we believe that this particular conversation was recorded by a person 'acting under color of law'." At Page 985. (Emphasis added.)

In *this* case, there was no monitoring, no simultaneous "interception", no *advance* or *prior* consent. Thus, *Rich* supports this Petitioner, rather than the Government.

4. However, there is a *governmental regulation* that supports this Petitioner. The Federal Communications Commission promulgated regulations to preclude the surreptitious use of electronic devices to record telephone conversations *without notice*, and required use of the "beep", the automatic tone warning, anytime one party used a recording device.[37] Later, in 1964 the Commission also forbade eavesdropping with radio devices,[38] except with the consent of *all* the parties to the radio transmission. The Commission felt that:

> "Upon reflection, we do not believe it to be consistent with the public interest to permit this new product of man's ingenuity to destroy our traditional right to privacy."[39]

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[37] See FCC Report: *"In Re* Use of Recording Devices in Connection With Telephone Service", 11 F.C.C. 1033 (1947).

[38] 31 Fed. Reg. 3397, acting under 47 U. S. C. 301, 303 (r) (1964).

[39] 31 Fed. Reg. 3397, 3398 (1964).

Professor Kent Greenawalt of Columbia University suggests that the foregoing Commission position "bears a marked resemblance to the dissenting arguments of Justice Brennan in *Lopez* . . .".[40]

But the Commission also made one exemption:

> "This section shall not apply to operations of any law enforcement officers conducted under lawful authority."

Professor Greenawalt, in the same article, at p. 207, fn 93, comments on that exclusion, noting that "Conceivably, evidence gathered by an individual and later given to the police could raise an exclusion problem". *This is exactly the issue here.*

This Court, however, has spoken as to "color of law" in *United States* v. *Screws*,[41] where this Court held that:

> "It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it."

Thus a Government attorney can act within his own federal authority—but he himself cannot delegate his own authority to a private person for private purposes. Just as a Sheriff may assemble a posse to aid him pursue rustlers, yet a Sheriff may not assemble a Posse to aid some private person in some private *vendetta*.

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[40]Columbia Law Review, Feb. 1968, "The Consent Problem in Wiretapping, Vol. 68L: 189 at pp. 205-6 (1968).

[41] 325 U.S. 91, 111 (1944).

The Government Attorneys are even restricted in their use of their powers to arrange for immunity.[42]

The Seventh Circuit has held that:

> ". . . prosecutorial agreement may effectively function, extra-statute, to confer immunity other than through a legislative-authorized method . . . *However, in promising to refrain from prosecution in order to secure a witness' cooperation, the federal prosecutor must act within the ambit of* his authority, cf. *People* v. *Ford,* 99 U.S. 594 (1878) . . .".[43] (emphasis added).

Congress did not include within any of the powers granted to United States Attorneys, the authority to bestow Federal "color of law" to a private person for private purposes under the circumstances present here. Neither Pete Pappas nor the Government felt that Pete Pappas was acting "under color of law". Rather, he was acting without any "color of law".

H. Conclusion

It may be, as the Government asserts, that in no prior case, have "consensual" tapes been suppressed because they were not under "seal" or because the originals had not been produced.[44] However, we submit respectfully, that it is also more likely, that *this* case is a case of *first impression* and, that in prior cases, the Government was more careful.

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[42] In this case, Federal attorneys provided for grants of immunity to corporations, even though corporations have no 5th Amendment privileges—in order to secure the testimony of the corporation's executives.

[43] *In Re John M. Daley,* #76-1657, 7th Cir., 1976.

[44] P. App. Br. 120.

We also note that "consensual" tapes have been suppressed, because the Government agents did not conform, nor comply, with prosecutorial or Attorney General Guidelines.[45]

Further, the tapes here were *independent third party evidence* of the alleged conversations, as in *Monroe* v. *United States*, 98 US App (D C), 234 F. 2d 49, 228-4, because Pete Pappas did not himself give his direct testimony as to those conversations. The tapes were *not* here used to *corroborate*, and do not thus come within *Lopez* or *Osborn*.[46] We also note that the Courts do not hesitate to suppress court-ordered tapes, if those tapes are *not* immediately delivered to the court ordering the tapings. See *United States* v. *Gigante*, 538 F. 2d 202 (1976) (2d Cir. NY CA), *suppressing tapes; United States* v. *Falcone*, 505 F. 2d 478 (1974) (3rd Cir. CA) admitting the tapes, *cert. denied* 420 U. S. 955 (1975); *Angelini* v. *United States*, 565 F. 2d 469 (1977), (7 Cir. Ill.) #77-1152, *cert. pending* #77-938, tapes suppressed on trial, and issue now before the Court.

It is respectfully submitted, that under the circumstances in this case, that the Trial Court should have suppressed the tapes presented by the Government, because the Government had not met its burden of proof and further, by the exercise of judicial discretion. *McNabb* v. *United States*, 318 U. S. 332, 341, (1943).

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[45] *United States* v. *Jacobs*, 531 F. 2d 87 (2d Cir. NY 1977), cert. granted, #76-1193; re-argued Mar. 20, 1978. *United States* v. *Caceres*, 545 F. 2d 1182 (9th Cir. Cal. 1977), cert. pending, #76-1309.

[46] *Lopez* v. *United States*, 373 U.S. 427 (1963). *Osborn* v. *United States*, 385 U.S. 323 (1966).

Though the trial court has the power and authority to rule on admissibility, its power does not include unbridled discretion to disregard the problems inherent with tapes generally, and the problems with the tapes presented here. The rulings of the trial court are reviewable here. *United States* v. *Starks*, 515 F. 2d 112 (1975). Moreover:

> "It has long been settled that this Court will not be bound by the findings of lower courts when it is alleged that fundamental constitutional rights have been violated. *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964); *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Watts* v. *Indiana*, 338 U. S. 49 (1949); *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652 (1945); *Norris* v. *Alabama*, 294 U. S. 587 (1935). We have said, "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate." *Napue* v. *Illinois*, 360 U. S. 264, 271 (1959).", and
>
> "Thus, although petitioners make their main arguments on constitutional grounds and raise serious Fourth and Sixth Amendment questions, it should not even be necessary for the Court to reach those questions. For the affront to the quality and fairness of federal law enforcement which this case presents is sufficient to require an exercise of our supervisory powers. As we said in ordering a new trial in *Mesarosh* v. *United States*, 352 U. S. 1, 14 (1956), a federal case involving the testimony of an unsavory informer who, the Government admitted, had committed perjury in other cases:
>
> > 'This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice

> are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.
>
> . . .
>
> 'The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them'."[47]

4. This Court now has before it, a Petition for Certiorari on the issue of whether tapes should be suppressed, where the Guidelines of the Attorney General governing "interceptions" of "consensual" conversations were not complied with. United States v. Caceres, #76-1309, cert. to 545 F. 2d 1182 (9th Cir. Cal.) (1977).

The Question in that case and this case are on all fours with the Question posed here.

1. Factual Background.

The Investigation leading to 74 CR 879, was led by USA Thompson, who delegated to AUSA Skinner the day-to-day duties to oversee the task force. Skinner recruited D'Hooge from the Postal Service to supply recording devices and tapes, but it was Skinner who directed when and to whom to supply that government equipment. D'Hooge supplied it to Pete Pappas to "intercept" "oral communications", and to Pete Pappas and Donald Carpentier to "intercept" telephone conversations.

Six "tapes" were produced at the trial.

2. During pre-trial proceedings, the Government Attorneys, though ordered to supply full information and evidence to the Defense, including the Tapes, did not at

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[47] Chief Justice Warren, in his dissent in *Hoffa* v. *United States*, 385 U.S. at 313 and 320 (1966).

any time, reveal the Guidelines promulgated by the Attorney General governing his limitations upon the "interception" of consensual conversations. They were promulgated on October 16th, 1972, and in part, required his personal approval of an *advance* written request.[48] Later, in September of 1973, the Assistant Attorney General in Charge of the AG Criminal Division was delegated authority to act as well.[49]

It is conceded, that prior to the Trial, the Government incorporated within an Exhibit (R. 125), a 15-page document, one letter from the Chief Postal Inspector with one obscure sentence therein that: "All of the consensual type monitoring was conducted in accordance with existing Attorney General Guidelines covering this type of electronic surveillance." (R. 125, sheet 15). No evidence was presented by the Government as to what the "guidelines" were and as to how there was compliance by the postal service. Nor did they submit the written approval of the Attorney General or of his Deputy.

During the pre-Trial Hearings of the Motions to Suppress, Attorney Magidson sought to determine who had authorized the interception of Tape 102. Skinner testified that his specific sanction was given to D'Hooge and that D'Hooge and the other inspectors checked ". . . it with their superiors in Washington . . ." (Tr. 472).

At Tr. 473 Skinner testified as follows:

> "Q. Now when you say that these requests were made through channels, were these written requests?

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[48] Appendix G to *this* Petition.

[49] Appendix H to *this* Petition.

A. Sometimes—I didn't make any written request. The Postal inspectors may have. I do know that in some cases, it was necessary to deal by phone because of the short notice that we had and followed it up with paper work.

Q. Are there, to your knowledge, any memoranda of these requests or approvals?

A. Oh, I recall that the postal inspectors told me afterwards that they had to submit reports to Washington concerning *what happened* and they would, from time to time, tell me they couldn't do something because they had to get their reports in. So, I think they did submit reports and as far as I know, they still exist." (Emphasis added)

2. Skinner clearly implied that he had no compulsion to seek advance authority to direct the tapings he himself directed. Even the Inspectors had no great compulsion—they had merely "checked" with Postal officers in Washington. Skinner did not mention any Guidelines, nor the required advance written request to be made by him to the Attorney General. Skinner, by his testimony, shielded any inquiry into those Guidelines.

3. There was no further inquiry by the Defense, they not being then aware of the Guideline principles.[50]

4. It is clear, that under those Guidelines, that, Skinner, or perhaps his immediate Superior, U.S.A. Thompson, were mandated to address "Requests for authorization to monitor private conversations . . ." to the Attorney General. They were the ones who were responsible for the investigation involved here.

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[50] During the period when the Seventh Circuit was considering a Suggestion for a Re-Hearing of the En Banc panel decision, the Defense Motion to permit a hearing in the District Court on this issue was denied. Appendix I.

5. The Government Attorneys have not, to this day, submitted to the Court, nor to the Defendants, the Petitioners here, any evidence of *their* compliance with those Guidelines. After the Seventh Circuit precluded inquiry (March 1978), as to such compliance, this Petitioner made a demand under the Freedom of Information Act,[51] to the Attorney General on March 7, 1978, and to the Chief Postal Inspectors on March 16th, 1978, for that information. At the time this Petition was filed, that demand had not yet been complied with.

A similar demand to the U. S. Attorney here, has not been honored as yet either.

6. It is submitted that this Court, within its supervisory powers over the Administration of Criminal Justice, should now suppress the Tapes. The Government has not met its burden of proof, and its actions are within those actions condemned by this Court on a number of prior occasions. *McNabb* v. *United States,* 318 U. S. 332 (1943); *United States* v. *Caceres,* supra, citing *United States* v. *Sourapas,* 515 F.2d 259 (9th Cir. 1975).

5. This Court should now exercise its discretionary judicial power of supervision of federal criminal justice, to reverse the Trial Court's action in Consolidating the Mail Fraud Indictment (74 CR 879) with a Perjury Indictment (75 CR 202).

A. This Court is now considering on *certiorari,* the issue of whether a Court of Appeals should exercise judicial power to suppress evidence of a perjury and the indictment. *United States* v. *Jacobs,* cert. granted, 77-1913. Factually, on this point, *Jacobs* is virtually on all fours with this case.

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[51] 5 U.S.C. 552.

There, the government armed with tapes of Jacobs' conversation, questioned her before the Grand Jury, the questions based, unbeknownst to her, on those tapes. The Trial Court granted a defense Motion to Suppress her Grand Jury testimony and to quash the perjury count, relying upon Fifth Amendment violations and lack of due process.

The Second Circuit affirmed, but on *other* grounds, holding that the Government's interrogatories before the Grand Jury, without fully warning Jacobs, and particularly about the "intercepted" conversations, was outside the penumbra of fair play; and was contrary to prosecutorial practices within that Circuit.

B. The Facts in this Case.

Kenneth W. Course was subpoenaed to testify before the Special April 1973 Grand Jury. He was interviewed by Federal agents, and his conversations with Pete Pappas were surreptitiously taped.[52] Course later testified before that Grand Jury. The government, armed with the tapes, questioned Course about receipt and passage of moneys allegedly as bribes. Course, being unaware of the tapes, denied complicity.

Course was indicted under this indictment (74 Cr 879), with seven *other* defendants, and later was indicted by himself for his alleged perjury (75 Cr 202).

The Government Motion to Consolidate two Indictments for Trial, without Notice to this Petitioner, was granted. Objections were overruled, Motions for Severance

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[52] Pete Pappas "intercepted" Course on Tape #102 on October 15th, 1973; and on Tape #104 on November 14th, 1973.

denied. Course was convicted of both charges under both indictments.

C. This Petition should now be granted, though Course is not a party to it,[52a] since the Consolidation of the two separate cases was prejudicial to this Petitioner.

This Court has the power to supervise the administration of criminal justice in the federal courts, and it may now order reversal of the Consolidation of the two Indictments. Its power is not limited to applications of only minimal constitutional guarantees under the Bill of Rights. *McNabb* v. *United States*, 318 U. S. 332 (1943).

D. If the Trial Court had *not* consolidated these two indictments for the *one* trial, then, upon the trial of the mail fraud case (74 Cr 879) alone, the Government could not have brought to the attention of the petit jury, that Course had been indicted for perjury in 75 Cr 202.

Separate trials would have assured this Petitioner that his "presumption" of innocence of the substantive charges in 74 Cr 879, until proven guilty, would not be tainted by the perjury charge solely against Course in 75 Cr 202.

E. The Defense of all the Defendants was tainted by the consolidation. The petit jury was informed in open court, that the Grand Jury had not believed Course when he denied receipt and passage of "bribe" money.

Course's defense was that bribery was not involved, and that only campaign funds were involved. The defense of this Petitioner was adversely and prejudicially affected,

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[52a] Course withdrew his appeal 76-2091 and passed away.

because his defense was that any funds received by Course were campaign funds.

When the petit jury dis-believed Course, impeached as he was by the perjury indictment, his fate in the mail fraud case was sealed. So was the fate of his other co-defendants. They now had an insurmountable burden of proof, to prove that Course had not lied to the Grand Jury.

The petit jury lost the opportunity to hear only the mail fraud case, and to find the defendants, innocent or guilty, without any reference to the perjury charge against Course. The Defense was thus tainted and prejudicially. (*United States* v. *Jacobs*, supra)

F. One may argue that instructions to the petit jury overcome such prejudice. Justice Jackson in *Krulewitch* v. *United States*[53] noted concisely that:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practising lawyers know to be unmitigated fiction."

Justice Frankfurter, in his strong dissent in *Delli Paoli* v. *United States*[54] noted that admonitions to any petit jury are a ". . . futile collation of words and fails of its purpose as a legal protection to defendants . . .".

Judge Learned Hand has admonished that an application by the jury of an instruction to overlook undue prejudicial effects of evidence was a psychological feat beyond their powers.[55]

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[53] 336 U.S. 440, 453 (1949).

[54] 352 U.S. 232, 247 (1957).

[55] *Nash* v. *United States*, 54 F.2d 1006, 1007, 352 U.S. at 247.

6. The Government's conduct in this case was an abuse of and a violation of this Petitioner's right to counsel under the Sixth Amendment.

This Petitioner adopts the portions of Petitioner Walker's Petition on this Point, and suggests that the Seventh Circuit erred in its rejection of this issue.[56]

The question as to this Petitioner is: When was the "critical" stage of the prosecution reached?

The Seventh Circuit relies strongly upon *Hoffa*[57] for the principle that:

> "In any event, the government is certainly not required to cease an on-going investigation into a far-reaching scheme such as this when it appears to have probable cause to seek an indictment as to one individual." Joint App. p. 84

However, in examining *Hoffa,* sharp distinctions can be made. Partin, a guest and invitee, overheard Hoffa during the course of the *Test Fleet* case. This Court said:

> ". . . in the present case that none of the petitioner's (Hoffa's) incriminating statements which Partin heard were made in the presence of counsel, in the hearing of counsel, or in connection in any way with the legitimate defense of the Test Fleet prosecution." at p. 308

Here, though none of the conversations on tape occurred in the presence of counsel, those conversations related only to *this* case—they did not relate to some *other new* separate offense, as in *Hoffa.*

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[56] Joint App. p. 83.

[57] *Hoffa* v. *United States.* 385 U.S. 293 (1966).

Moreover, in *Hoffa,* during Partin's overhearings, there was no ongoing investigation nor any Grand Jury impaneled to investigate alleged jury tampering. Partin's overhearing, in fact, *initiated* the jury tampering charge.

Here, the investigation of *past events* commenced in January, 1973. The Grand Jury was impaneled on April 1st, 1973. In mid-August, the ready-mix executives had all given their evidence and received immunity: and by September 24th, 1973, the Government had in hand from Pete Pappas—his disclosure of his evidence.

This Petitioner was first taped by Pete Pappas on September 27th, 1973—*after* the Government had on hand, all of the testimony of their immunized witnesses.

The Government then deferred the proceedings from time to time, and did not secure the indictment until December, 1974. The Government thus argues that the "critical" stage was not reached until then—not until December, 1974.

However, that position means that the Government can orchestrate and itself determine when the "critical" stage is reached, to the prejudice and detriment of anyone under investigation. Moreover, the Seventh Circuit begs the question when it stated that the Government is not required to stop its investigation when it appears to have "probable cause"—because the Government does *not* stop any investigation, merely because the indictment issues. Thus, "stopping" the investigation does not determine the "critical" stage.

If this Petitioner had caused the surreptitious taping of conversations of other prospective defendants or even of the federal attorneys and investigators, he would have

been charged with obstruction of justice and perhaps even of illegal eavesdropping.[58]

It is thus submitted that the Government's action and the "taping" are an abuse, and the Government should be estopped as to its arguments since the Government controlled the date when the indictment would issue, and their investigation could have continued on even after the indictment was issued. If such actions would be an obstruction of justice if made by this Petitioner, certainly, those same actions have the same impact upon the Government.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court will issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

PETER V. PAPPAS

Pro Se

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[58] In fact, the taping by Pete Pappas was ostensibly for that very reason, to secure evidence of possible "obstruction of justice" by Peter V. Pappas! (Tr. 101-2, Motions to Suppress). The record is clear that such charges were never brought.

APPENDIX G

Oct 16 1972

MEMORANDUM TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

Re: Monitoring Private Conversations with the Consent of a Party

This memorandum concerns the investigative use of electronic and mechanical devices secretly to overhear, transmit, or record private conversations when one or more of the parties to the conversation is a Federal agent or is cooperating with a Federal agent and has consented to the overhearing, transmitting, or recording of the conversation. This memorandum does not restrict any form of monitoring when all parties to the conversation consent, nor does it affect existing instructions on the related matter of electronic surveillance without the consent of any party to a conversation. (See Manual for Conduct of Electronic Surveillance under Title III of Public Law 90-351; and Outline of Duties and Responsibilities of Attorneys and Agency Personnel Involved in the Conduct of Title III Court Authorized Interceptions, distributed Nov. 3, 1970).

* * *

II. *Administrative Regulations Concerning Consensual Monitoring Conversations.*

The monitoring of conversations with the consent of one of the participants is a particularly effective and reliable investigative technique, and its use by Federal agents in investigating criminal cases is encouraged where appropriate and is expected where necessary. Nevertheless, although it is clear that such monitoring is constitutionally

and statutorily permissible—and therefore, that it may be conducted without judicial warrant—it is appropriate that this investigative technique continue to be the subject of careful self-regulation by the Executive Branch of the Federal Government. Accordingly, the following restrictions will apply in all criminal investigations employing the consensual monitoring of conversations.

(a) *Conversations other than telephone conversations.*

All Federal departments and agencies shall, except in exigent circumstances as discussed below, obtain the advance authorization of the Attorney General or any designated Assistant Attorney General before using any mechanical or electronic device to overhear, transmit, or record private conversations other than telephone conversations without the consent of all the participants. Such authorization is required before employing any such device, whether it is carried by the cooperating participant or whether it is installed on premises under the control of the participant.

Requests for authorization to monitor private conversations shall be addressed to the Attorney General, in writing, by the head of the department or agency responsible for the investigation, or his delegate, and shall state:

1. The reason why monitoring appears desirable, the means by which it would be conducted, the place in which it would be conducted, and its expected duration.

2. The names of the persons whose conversations would be monitored and their roles in the matter under investigation. When the name of the nonconsenting party or parties is not known at the time the request for authorization is made, the department or agency making the request shall supply such information to the Attorney General within 30 days after the termination of the monitoring.

3. That it is the considered judgment of the person making the request that monitoring is warranted in the interest of effective law enforcement.

Requests for authorization will receive prompt consideration by the Attorney General or his designee. To assure adequate time for considering a request and for notifying the requesting department or agency of the appropriate decision, it is important that each request be received by the Office of the Attorney General no less than 48 hours prior to the time of the intended monitoring. It should be clearly understood that the use of consensual devices will not be authorized retrospectively.

Where a request cannot be made in compliance with the 48-hour requirement, or in exigent circumstances precluding request for authorization in advance of the monitoring —such as the imminent loss of essential evidence or a threat to the immediate safety of an agent or informant— emergency monitoring may be instituted under the authorization of the head of the responsible department or agency or other agency official or officials designated by him. The Attorney General or his designee shall be notified promptly of any such monitoring and of the specific conditions that precluded obtaining advance approval, and shall be afforded the information enumerated above that would have been given in requesting advance approval. Each department and agency should develop procedures to assure that under such exigent circumstances its agents will be capable of acting expeditiously. The Attorney General or his designee shall be kept advised as to the identity of those officials who have been designated by department or agency heads to authorize such emergency monitoring. . . .''.[59]

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[59] The foregoing is not published in the Federal Register nor in any other public document, and came to light and known to this Petitioner in February, 1978.

APPENDIX H

Washington, D.C. 20530

DESIGNATION OF ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE CRIMINAL DIVISION AND HIS DEPUTIES TO AUTHORIZE THE CONSENSUAL MONITORING OF PRIVATE CONVERSATIONS.

Order No. 537-73

By virtue of the authority vested in me by 28 USC 509, 510 and 5 USC 301, I hereby designate the Assistant Attorney General in charge of the Criminal Division and the Deputy Assistant Attorneys General of that Division to authorize the monitoring of private conversations under the provisions of Part II(a) of the Attorney General's Memorandum of October 16, 1972, to the Heads of Executive Departments and Agencies entitled "Monitoring Private Conversations with the Consent of a Party." A Deputy Assistant Attorney General shall exercise such authority only when the Assistant Attorney General is absent from the City of Washington or is otherwise not in a position to take timely action on a request by a department or agency for authorization to monitor private conversations.

Dated: 9/4/73

Signature Illegible
Attorney General

APPENDIX I

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
March 10, 1978

Before
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

Nos. 76-2089, 76-2092 and 76-2093

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROBERT CRAIG, PETER V. PAPPAS and JACK E. WALKER,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74-Cr-879
George N. Leighton, Judge

This matter comes before the court for its consideration upon the filing herein of the following documents:

1) The "MOTION FOR LEAVE TO JOIN IN MOTION OF CO-DEFENDANT" filed herein on February 23, 1978 by counsel for the defendant-appellant Jack E. Walker only in Appeal No. 76-2093. That motion requests leave to join in the "MOTION FOR LEAVE TO REQUEST HEARING BEFORE DISTRICT COURT" previously filed by the defendant-appellant Robert Craig in Appeal No. 76-2089.

2) The "GOVERNMENT'S RESPONSE TO DEFENDANT-APPELLANT WALKER'S MOTION FOR LEAVE TO JOIN IN MOTION OF CO-DEFENDANT" filed herein on March 6, 1978 by counsel for the plaintiff-appellee only in Appeal No. 76-2093.

3) The "MOTION FOR RECONSIDERATION OF ORDER OF FEBRUARY 23rd, 1978 and of MOTION FOR LEAVE TO REQUEST HEARING BEFORE THE FEDERAL DISTRICT COURT" filed herein on March 6, 1978 by the pro se defendant-appellant Peter V. Pappas, only in Appeal No. 76-2092.

4) The "DEFENDANT-APPELLANT'S REPLY TO GOVERNMENT'S RESPONSE TO MOTION FOR LEAVE TO REQUEST HEARING BEFORE FEDERAL DISTRICT COURT" also filed herein on March 6, 1978 by the pro se defendant-appellant Peter V. Pappas, only in Appeal No. 76-2092.

5) The "MOTION FOR LEAVE TO JOIN IN MOTION AND REPLY FILED BY DEFENDANT-APPELLANT PETER V. PAPPAS" filed herein on March 7, 1978 by counsel for the defendant-appellant Jack E. Walker, only in Appeal No. 76-2093.

6) The "MOTION OF THE DEFENDANT-APPELLANT CRAIG FOR LEAVE TO ADOPT MOTION FOR RECONSIDERATION FILED BY PETER V. PAPPAS AND FOR LEAVE TO ADOPT HIS REPLY" filed herein on March 7, 1978 by counsel for the defendant-appellant Robert Craig, only in Appeal No. 76-2089.

This court has thoroughly reviewed the aforesaid documents and is fully advised concerning the circumstances of this matter. Accordingly,

It IS ORDERED that leave is hereby GRANTED to file instanter, nunc pro tunc as of the dates of their respective filings, documents numbers 4, 5 and 6 above.

IT IS FURTHER ORDERED that, treating the reply of the pro se defendant-appellant Peter V. Pappas as a motion in support of his motion for reconsideration of this court's previous order of February 23, 1978, said motion for reconsideration is hereby DENIED.

IT IS ALSO FURTHER ORDERED that the defendants-appellants Jack E. Walker and Robert Craig are hereby also DENIED reconsideration of this court's previous order of February 23, 1978.